

STATE OF MICHIGAN
COURT OF APPEALS

MARCE KAY LATOSKI,

Plaintiff-Appellee,

v

ROBERT LEE LATOSKI,

Defendant-Appellant.

UNPUBLISHED
February 21, 2017

No. 330404
Isabella Circuit Court
LC No. 2012-010405-DM

Before: Hoekstra, P.J., and Saad and Riordan, JJ.

PER CURIAM.

Defendant appeals as of right from an amended judgment of divorce. On appeal, defendant challenges the trial court's division of the parties' property and contends that the judges involved with the case acted with impropriety. Because the division of property was not an abuse of discretion and defendant's claims of judicial bias are without merit, we affirm.

I. FACTS

The parties married on February 14, 1998, and they have one child. Plaintiff worked at a casino, and defendant operated an automobile business in a pole barn on the property of the marital home. Plaintiff filed for divorce in November of 2012. Over the next three years, the parties engaged in a lengthy dispute over the division of property, including the marital home, two other parcels of real estate, numerous guns, personal property, vehicles, plaintiff's 401(k) worth \$60,000, and defendant's automobile business (including tools, inventory, and equipment) valued at \$35,000.

A bench trial was held in September of 2013. Following the bench trial, a judgment of divorce was entered on January 3, 2014. The judgment excluded from division between the parties one of the real estate parcels which had been given to plaintiff by her father and was not marital property. Otherwise, the trial court treated the remaining property as marital property. The judgment awarded plaintiff her 401(k), awarded defendant his business, awarded plaintiff her 2004 Ford Explorer and awarded defendant a motorcycle with the qualification that the motorcycle should be appraised. Each party was "credited" with half the value of the property awarded to the other party. Because plaintiff ultimately received more property than defendant, the trial court ordered plaintiff to pay defendant a sum "to equalize the division of marital assets." All other property was to be sold at auction and the proceeds evenly divided.

However, this judgment of divorce did not resolve the parties' dispute. An auction was not held, defendant did not have his motorcycle appraised, plaintiff sold some property,¹ and the parties ultimately did not follow the provisions in the judgment of divorce. Moreover, the parties soon saw a change in circumstances insofar as they lost both the marital home and the additional marital real estate property to forfeiture for nonpayment. Plaintiff, who had been living in the marital home, was evicted. After the forfeiture of the marital home, defendant began to rent the house and he continues to operate his automobile business on the property.

At some point, the parties sought to reopen proofs and to amend the judgment of divorce. An order to reopen proofs was entered. The trial court also ordered the parties to submit "a complete listing of and accounting for all property that was disposed of in the parties' Judgment of Divorce," including the property's current location, "as much detail" about any buyer and sale price of any sold property, and "an explanation" for any property for which the location was "unknown." The case was then reassigned to a new judge, and additional testimony was taken by the new judge in May of 2015.

The parties provided additional testimony regarding various items of property. As they had during the initial proceedings, both parties contended that property was "missing" and there were accusations that both parties had taken property. Defendant, in particular, asserted that many of his tools for the automobile business were missing. However, the parties' testimony also made clear that both parties were still in possession of various items and that they had reached an agreement regarding the distribution of their guns. Plaintiff testified that an auction was not held to dispose of the other property because the residual property was "basically junk" and the auctioneer she contacted indicated that an auction would not be worth his time.

Following this additional testimony, the trial court found that neither party had complied with the original judgment of divorce, specifying that "the parties failed to gather all the assets for the purposes of an auction" and that neither party came before the court "with clean hands." The trial court faulted both parties for the loss of equity in the marital home, and no award to either party relative to the lost real estate was made. Ultimately, the trial court again awarded plaintiff her 401(k), valuing it at \$60,000, and her Ford Explorer, finding that it had \$2,500 in equity.² Next, the trial court awarded defendant his business, continuing to value it at \$35,000. Defendant was also awarded his motorcycle, valued at \$10,000. The trial court credited defendant with half the value of the items awarded to plaintiff, and did the same for plaintiff regarding the items awarded to defendant. After doing so, it concluded that plaintiff owed defendant \$8,750. The court also ordered that the parties would retain the guns in their respective possessions, in keeping with their agreement. Aside from the itemized division of these specific assets, the trial court awarded both parties the personal property "in their possession." In not providing for a more detailed division of this residual property, the trial court

¹ For selling items, plaintiff pleaded guilty to a misdemeanor. She was ordered to pay defendant restitution in the amount of \$5,000, which was the *total* she received for selling items. This restitution was in addition to the property settlement in the divorce case.

² Plaintiff also retained her ownership of the real estate property that was not marital property.

commented on the lack of proofs regarding missing items and noted that, from what proofs had been offered, a lot of the identifiable remaining items “look[ed] like junk.” An amended judgment of divorce consistent with the trial court’s oral opinion was entered by a third judge on October 30, 2015. Defendant now appeals as of right.

II. PROPERTY DIVISION

Defendant first argues that the trial court failed to equitably divide the parties’ property. In particular, defendant states in his brief that “[i]t is not equitable for [defendant] to have lost possession of a substantial amount of his household goods, along with tools, inventory, and equipment that were an integral part of [defendant’s] business, and not jointly owned.” Defendant contends that plaintiff lied about the property in her possession and ended up receiving the majority of defendant’s “personal and business property.”

“In a divorce action, this Court reviews for clear error a trial court’s factual findings on the division of marital property and whether a particular asset qualifies as marital or separate property.” *Hodge v Parks*, 303 Mich App 552, 554; 844 NW2d 189 (2014). “If the trial court’s findings of fact are upheld, the appellate court must decide whether the dispositive ruling was fair and equitable in light of those facts.” *Woodington v Shokoohi*, 288 Mich App 352, 355; 792 NW2d 63 (2010). “The trial court’s dispositional ruling is discretionary and will be affirmed unless this Court is left with the firm conviction that it was inequitable.” *Reed v Reed*, 265 Mich App 131, 150; 693 NW2d 825 (2005).

“A trial court’s first consideration when dividing property in divorce proceedings is the determination of marital and separate assets.” *Woodington*, 288 Mich App at 358 (citation and quotation marks omitted). “Generally, marital property is that which is acquired or earned during the marriage, whereas separate property is that which is obtained or earned before the marriage.” *Cunningham v Cunningham*, 289 Mich App 195, 201; 795 NW2d 826 (2010). Marital assets are subject to division between the parties, while typically “separate assets may not be invaded.” *Woodington*, 288 Mich App at 358. When dividing marital assets, each spouse need not receive a mathematically equal share, but there should be “an equitable distribution of property in light of all the circumstances.” *Hodge*, 303 Mich App at 560-561.

In this case, we conclude that defendant has abandoned his arguments regarding the trial court’s distribution of property due to his failure to properly brief the issue for this Court’s review. See MCR 7.212(C)(7). In this regard, in part, defendant’s argument appears to involve the assertion that certain items belonged solely to defendant because they were part of his business and that these items should not have been included in the marital estate for division between the parties. However, defendant merely offers the bald assertion that these items were not jointly owned. He has not explained when these items were acquired or otherwise provided an explanation of why these items should be considered his sole property. See *Cunningham*, 289 Mich App at 201. He certainly has not cited any legal authority to support the proposition that “business” property is necessarily not marital property; and, indeed, a business can constitute

part of the marital estate.³ See, e.g., *Hanaway v Hanaway*, 208 Mich App 278, 294; 527 NW2d 792 (1995). Furthermore, in making his argument, defendant has not even bothered to identify the “household goods, tools, inventory, and equipment” in question with a degree of specificity sufficient to enable our review. Yet, without a detailed discussion of the property retained by each party, defendant nevertheless asserts that the property division was “inequitable.”

Defendant “cannot simply assert an error or announce a position and then leave it to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position.” *Mitchell v Mitchell*, 296 Mich App 513, 524; 823 NW2d 153 (2012) (citation and quotation marks omitted). Given defendant’s failure to adequately brief the issue, his argument is abandoned and it need not be considered. See *McIntosh v McIntosh*, 282 Mich App 471, 484; 768 NW2d 325 (2009); *Reed*, 265 Mich App at 157.

Moreover, we note briefly that, even if we were to consider the issue, it does not appear that defendant would be entitled to relief. Following three years of dispute between the parties, the trial court entered a judgment valuing and dividing the parties’ major marital assets, consisting of defendant’s \$35,000 business, plaintiff’s \$60,000 401(k), plaintiff’s \$2,500 vehicle, and defendant’s \$10,000 motorcycle. Because plaintiff’s property award was slightly higher, plaintiff was also ordered to pay defendant \$8,750 to equalize the award. Nothing in this division strikes us as inequitable. With regard to the remaining items, the parties agreed to a distribution of the guns, and thus defendant cannot now complain about the distribution of the weapons. See *Hodge*, 303 Mich App at 555-556. The parties were also allowed to keep the remaining unspecified personal property in their respective possessions. Given defendant’s lack of specificity on appeal, we cannot conclude that this distribution was inequitable when the record clearly shows that *both* parties had property in their possession that they were allowed to retain. Further, as found by the trial court, the evidence showed that much of the identifiable residual property consisted of “junk.” On this record, we are not firmly convinced that the trial court’s distribution of property was inequitable.

III. JUDICIAL BIAS

Finally, defendant argues that he was denied an impartial decision-maker in violation of due process.⁴ According to defendant, two of the judges involved in the case failed to abide by

³ Defendant’s business in particular was operated on marital property, in a pole barn constructed at the marital home by the parties during the parties’ marriage.

⁴ On appeal, in passing, defendant also raises undeveloped assertions against his trial attorneys, stating generally that his counsel “failed to perform up to standards commonly expected by the . . . bar.” Defendant failed to include this issue in his statement of the questions presented. MCR 7.212(C)(5). He also fails to explain how his attorneys were deficient, and he fails to cite any relevant legal authority. Therefore, defendant has abandoned any claim related to counsel’s representation. See *Mitchell*, 296 Mich App at 524.

the Michigan Code of Judicial Conduct and they had a bias against defendant as demonstrated by their conduct and decisions.

Defendant failed to file a motion for disqualification in the trial court, meaning that this issue is unpreserved. MCR 2.003(D); *In re Contempt of Henry*, 282 Mich App 656, 679; 765 NW2d 44 (2009). We review unpreserved claims of judicial bias for plain error. *People v Jackson*, 292 Mich App 583, 597; 808 NW2d 541 (2011). To establish plain error, defendant must show: “(1) that an error occurred, (2) that the error was plain, and (3) that the plain error affected defendant's substantial rights.” *Henderson v Dep’t of Treasury*, 307 Mich App 1, 9; 858 NW2d 733 (2014). “The third factor requires [defendant] to show he was prejudiced by the error such that it affected the outcome of the proceedings.” *Id.*

“Due process requires that an unbiased and impartial decision-maker hear and decide a case.” *Mitchell*, 296 Mich App at 523. Under MCR 2.003(C), grounds for disqualification of a judge include, but are not limited to, the following:

- (a) The judge is biased or prejudiced for or against a party or attorney.
- (b) The judge, based on objective and reasonable perceptions, has either (i) a serious risk of actual bias impacting the due process rights of a party as enunciated in *Caperton v Massey*, 556 U.S. 868; 129 S Ct 2252; 173 L Ed 2d 1208 (2009), or (ii) has failed to adhere to the appearance of impropriety standard set forth in Canon 2 of the Michigan Code of Judicial Conduct.

“A trial judge is presumed unbiased, and the party asserting otherwise has the heavy burden of overcoming the presumption.” *Mitchell*, 296 Mich App at 523. “Judicial rulings, as well as a judge's opinions formed during the trial process, are not themselves valid grounds for alleging bias unless there is a deep-seated favoritism or antagonism such that the exercise of fair judgment is impossible.” *Jackson*, 292 Mich App at 598 (citation and quotation marks omitted); *In re Contempt of Henry*, 282 Mich App at 680.

In this case, during the three years of litigation, three different trial judges—Judge William Ervin, Judge Mark Duthie, and Judge Eric Janes—presided over proceedings. Judge Ervin presided over the initial trial, he entered the initial judgment of divorce, and he granted the parties’ motions to reopen proofs. However, before additional evidence was taken, Judge Ervin recused himself on his own motion, at which time the case was assigned to Judge Duthie. Yet, on appeal, defendant’s allegations of impropriety and misconduct relate largely to Judge Ervin. Given that Judge Ervin recused himself, and an amended judgment of divorce was later entered by a different judge following the presentation of additional proofs, we fail to see how defendant can establish outcome determinative error with regard to Judge Ervin’s purported conduct.⁵

⁵ Moreover, with regard to Judge Ervin, we also note that our review is “limited to the record developed by the trial court.” *Kent Co Aeronautics Bd v Dep’t of State Police*, 239 Mich App 563, 580; 609 NW2d 593 (2000), citing MCR 7.210(A). Defendant fails to support his claims

After Judge Ervin's recusal, additional proofs were taken by Judge Duthie, who later made findings of fact and provided an oral opinion on the record. For reasons not clear from the record, the matter was later reassigned to Judge Janes, who ultimately entered the amended judgment of divorce consistent with Judge Duthie's findings and oral decision. Defendant offers no challenges with respect to Judge Janes, and there appears to be no basis on which Judge Janes should have been disqualified. See MCR 2.003(C); *Mitchell*, 296 Mich App at 523. Regarding Judge Duthie, defendant complains that Judge Duthie did not equitably distribute the parties' property, failed to hold plaintiff responsible for stealing property, failed to appoint an appraiser, and improperly awarded plaintiff a share of the parties' firearms when she stood accused of a felony. However, we note that, in connection with the criminal case, Judge Duthie in fact ordered plaintiff to pay restitution to defendant. Indeed, plaintiff was ordered to pay defendant *all* of the money she received for selling items, which is a larger share than defendant would have received had those items been sold at auction. With respect to plaintiff's ability to own firearms, plaintiff was only convicted of a misdemeanor, and defendant has not shown anything improper in Judge Duthie's distribution of the parties' firearms.⁶ More generally, we see nothing in Judge Duthie's decisions that evinces a deep-seated favoritism or antagonism; and, in these circumstances, Judge Duthie's rulings are not valid grounds for alleging bias. See *Jackson*, 292 Mich App at 598; *In re Contempt of Henry*, 282 Mich App at 680. Defendant has not shown bias, and we can see no other reason why Judge Duthie should have been disqualified under MCR 2.003(C). Overall, defendant has not shown plain error, and he is not entitled to relief based on his allegations of judicial impropriety.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Henry William Saad
/s/ Michael J. Riordan

against Judge Ervin with citation to the record. See MCR 7.212(C)(7). And, it appears that defendant's allegations against Judge Ervin, including assertions that Judge Ervin had a "drinking session" with the parties' son and that defendant filed a complaint with the Judicial Tenure Commission, have no basis in the record developed in the trial court.

⁶ See generally MCL 750.22f(1) ("[A] person *convicted* of a *felony* shall not possess . . . a firearm[.]") (emphasis added).